



September 24, 2002

Ms. Tamara Pitts  
Assistant City Attorney  
City of Fort Worth  
1000 Throckmorton Street  
Fort Worth, Texas 76102

OR2002-5383

Dear Ms. Pitts:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 169172.

The City of Fort Worth (the "city") received a request for information relating to Human Relations Commission Charge No. 31A-A0-101. You state that the city has released some of the requested information. The city claims that the remaining requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you raise and have reviewed the information you submitted.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception is applicable to information that other statutes make confidential. You inform us that the Fort Worth Human Relations Commission (the "city commission") was created under chapter 21 of the Labor Code. *See* Labor Code § 21.152 (providing for creation of local commissions). You state that in compliance with chapter 21, both the federal Equal Employment Opportunity Commission and the Texas Commission on Human Rights (the "state commission") have deferred jurisdiction to hear complaints to the city commission by written agreements. *See* Labor Code §21.154 (authorizing deferral of jurisdiction to local commissions); *see also* 40 T.A.C. §325.4 (authorizing cooperative agreements between state and local commissions). Under section 21.152 of the Labor Code, the city commission is a local agency authorized to investigate and resolve complaints. *See* Labor Code §§ 21.154 (authorizing local commission to which complaint is referred or jurisdiction is deferred to receive, investigate, conciliate, or rule on complaint), .204 (relating to investigation of complaint by state commission).

The city claims that sections 21.303, 21.304, and 21.305 of the Labor Code except the requested information from disclosure. Section 21.304, which relates to public release of information obtained by the state commission, provides as follows:

An officer or employee of the commission may not disclose to the public information obtained by the commission under Section 21.204 except as necessary to the conduct of a proceeding under this chapter.

Labor Code § 21.304. Section 21.207(b) of the Labor Code and section 327.10 of title 40 of the Texas Administrative Code also govern public access to state commission records. Section 21.207 provides in part:

(b) Without the written consent of the complainant and respondent, the commission, its executive director, or its other officers or employees may not disclose to the public information about the efforts in a particular case to resolve an alleged discriminatory practice by conference, conciliation, or persuasion, regardless of whether there is a determination of reasonable cause.

Labor Code § 21.207(b). Section 327.10 provides as follows:

(a) No officer or employee of the commission may make public any information obtained by the commission under its authority under the §§Texas Labor Code, 21.201-21.207 (formerly §Texas Revised Civil Statutes Annotated Article 5221k, 6.01), except as necessary to the conduct of a proceeding under this Act.

(b) No commissioner or employee of the commission may make public, without the written consent of the complainant and respondent, information about the efforts in a particular case to resolve an alleged discriminatory practice by conference, alternative dispute resolution, conciliation, or persuasion, whether or not there is a determination of reasonable cause.

40 T.A.C. § 327.10.

In this instance, however, the requestor represents a party to a complaint filed under section 21.201 of the Labor Code. *See* Labor Code § 21.201(a) (person claiming to be aggrieved by unlawful employment practice or person's agent may file complaint with state commission). Section 21.305 of the Labor Code, which is applicable to the release of state commission records to a party to a complaint filed under section 21.201, provides:

(a) The commission shall adopt rules allowing a party to a complaint filed under Section 21.201 reasonable access to commission records relating to the complaint.

(b) Unless the complaint is resolved through a voluntary settlement or conciliation, on the written request of a party the executive director shall allow the party access to the commission records:

(1) after the final action of the commission; or

(2) if a civil action relating to the complaint is filed in federal court alleging a violation of federal law.

Labor Code § 21.305. At section 327.9 of title 40 of the Texas Administrative Code, the state commission has adopted rules that govern access to its records by a party to a complaint. Section 327.9 provides:

Pursuant to the limitations established by the §§Texas Labor Code, 21.304-21.305 (formerly §Texas Revised Civil Statutes Annotated Article 5221k, 8.02(a)), the executive director shall, on written request of a party to a complaint filed under the §Texas Labor Code, 21.201 (formerly §Texas Revised Civil Statutes Annotated Article 5221k, 6.01(a)), allow the party access to the commission's records, unless the complaint has been resolved through a voluntary settlement or conciliation agreement, if:

(1) following the final action of the commission, a party to the complaint or the party's attorney certifies in writing that a civil action is to be filed under the Act within 60 days from the date of receipt of the commission's notice of right to file a civil action or a civil action under the Act is pending in state court; or

(2) a party to the complaint or the party's attorney certifies in writing that a civil action relating to the complaint is pending in federal court alleging a violation of federal law.

40 T.A.C. § 327.9.

You inform us that the city commission compiled and maintains the requested information under subchapter D of chapter 21 of the Labor Code. You also state that the city has released the responsive investigative file, with the exception of the highlighted settlement information in Exhibit C that the city seeks to withhold. Based on your representations, we find that the city has determined that the requested information relates to a complaint that was not

resolved through a voluntary settlement or conciliation agreement and that this request for information was made by an attorney who has certified in writing that the attorney represents a party in a pending civil action. Consequently, the city must grant the requestor access to the highlighted information in Exhibit C under section 21.305 of the Labor Code and section 327.9 of title 40 of the Texas Administrative Code. A release to this requestor under these provisions is not inconsistent with the prohibition of public release of information under section 21.207 of the Labor Code and section 327.10 of title 40 of the Texas Administrative Code. A release in this instance is not a release to the public under chapter 552 of the Government Code. *See* Open Records Decision No. 534 at 7 (1989).

Next, we address the city's claim under section 552.101 of the Government Code with regard to Exhibit D. The city asserts that this information is confidential under title I of the Americans with Disabilities Act of 1990 (the "ADA"), 42 U.S.C. §§ 12101 *et seq.*, which provides that information about the medical conditions and medical histories of applicants or employees must be (1) collected and maintained on separate forms, (2) kept in separate medical files, and (3) treated as a confidential medical record. Information obtained in the course of a "fitness for duty examination," conducted to determine whether an employee is still able to perform the essential functions of his or her job, is to be treated as a confidential medical record as well. *See* 29 C.F.R. § 1630.14(c); *see also* Open Records Decision No. 641 (1996). Furthermore, the federal Equal Employment Opportunity Commission (the "EEOC") has determined that medical information for the purposes of the ADA includes "specific information about an individual's disability and related functional limitations, as well as general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual." *See* Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997).

You state that the city commission obtained the information in Exhibit D from one of the parties to Charge No. 31A-A0-101. You assert that this information is confidential under section 12112 of title 42 of the United States Code. You also state, however, and the information in Exhibit D likewise reflects that the city commission obtained this information from the complainant and his physicians. You do not inform us that the complainant either is or has been an employee of the city or an applicant for city employment. Therefore, we conclude that the city has not demonstrated that title I of the ADA is applicable to the information in Exhibit D. *See also* Open Records Decision No. 641 (1996) (addressing applicability of title I of ADA to employment records of Texas Department of Criminal Justice).

We note, however, that section 611.002 of the Health and Safety Code is applicable to some of the information in Exhibit D. Chapter 611 of the Health and Safety Code provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002 provides in relevant part:

(a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

(b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Health & Safety Code § 611.002(a)-(b). Section 611.001 defines a “professional” as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. Sections 611.004 and 611.0045 provide for access to mental health records only under certain specified circumstances. *See also* Open Records Decision No. 565 (1990). We have marked the information in Exhibit D that is confidential under section 611.002 of the Health and Safety Code. The city must withhold the marked information under section 552.101 of the Government Code in conjunction with section 611.002, unless the requestor has a right of access to this information under sections 611.004 or 611.0045.

The city must withhold other information in Exhibit D under section 552.101 in conjunction with the common-law right to privacy. Common-law privacy protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, *and* (2) of no legitimate public interest. *See Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy under section 552.101 encompasses the specific types of information that the Texas Supreme Court held to be intimate or embarrassing in *Industrial Foundation*. *See* 540 S.W.2d at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has since concluded that other types of information also are private under section 552.101. *See* Open Records Decision Nos. 659 at 4-5 (1999) (summarizing information attorney general has determined to be private), 470 at 4 (1987) (illness from severe emotional job-related stress), 455 at 9 (1987) (prescription drugs, illnesses, operations, and physical handicaps), 343 at 1-2 (1982) (references in emergency medical records to drug overdose, acute alcohol intoxication, obstetrical/gynecological illness, convulsions/seizures, or emotional/mental distress). We have marked the information in Exhibit D that the city must withhold under section 552.101 in conjunction with common-law privacy.

In summary, some of the information in Exhibit D is confidential under section 552.101 in conjunction with section 611.002 of the Health and Safety Code. The city must withhold other information in Exhibit D under section 552.101 in conjunction with common-law privacy. The highlighted information in Exhibit C and the remaining information in Exhibit D are not excepted from disclosure and must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

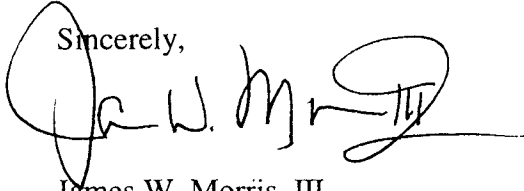
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J.W. Morris, III". The signature is fluid and cursive, with a large loop at the beginning and a long horizontal stroke at the end.

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/sdk

Ref: ID# 169172

Enc: Marked documents

c: Ms. Chandra L. Strieder  
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(w/o enclosures)